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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 293

ARMOUR AND COMPANY, a Corporation,

Petitioner,

against

THE ALTON RAILROAD COMPANY, a Corporation, *et al.,*

Respondents.

REPLY BRIEF OF PETITIONER

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Chicago, Illinois, January 11th, 1941.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

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INTRODUCTION.

Under the legal principles heretofore observed by this court, there are no facts before this court at this time, save those stated in the complaint. Defendants' motion to dismiss raises the single question of whether those facts, and *those facts alone,* state a cause of action of which the courts of law have original jurisdiction.

We are here confronted with a defendants' brief which is replete with fragmentary quotations from briefs and from records in other cases, which are not before this court; with fragmentary statements made by plaintiff's counsel in other cases; with gratuitous unsupported and wholly "off-the-record" statements of counsel, and with other *ex parte facts,* none of which have any bearing

upon this single question, which is the only question before this court for decision.

Categorically, we deny that we have made any statements to the Commission or to the lower courts in any way inconsistent with those made here; we deny that the facts upon which the *Swift* case was decided are similar to those alleged in the complaint; we deny that there is any existing contract between Armour and the Yards Company; we deny that the freight rate paid applied "only" to the public stock yards; and we deny every other *ex parte* facts stated by counsel in defendants' brief.

Most of these denials we could substantiate now, if we cared to stultify ourselves by also departing from the record, merely to complete and extend the fragmentary "off-the-record" quotations which counsel have brought into their brief. Except within the field permitted by judicial notice we shall not do so, for, if all of them were true, the court would not better be able to pass upon the sole question before it: Do the facts alleged in the complaint state a cause of action of which a court of law may take cognizance?

If we have blown hot and cold in other records, and in other briefs, our statements may be offered in evidence at a trial *on the merits,* as admissions against interest, or by way of impeachment, and unless we rebut or explain them we shall fail. If the facts upon which the Commission decided the *Swift* case *are* on all fours with the facts proven here, no doubt the Commission's decision of that case will control this one. But that must be developed at a hearing *on the merits,* and not assumed here. If the Commission must fix the limits of the station "Union Stock Yards, Illinois" because the carriers' tariffs do not, that must arise after it has been developed at a hearing on the merits, that

the tariffs of the carriers do not fix those limits; if there be some contract, made in 1892, under which Armour is estopped from asserting the rights here claimed, that is a matter to be determined at a hearing on the merits, and not assumed here.

Counsel's reference to these, and many other points, are *not* grounded upon *any allegations found in the complaint* which is the only factual record now before this court. The rebuttal of the innuendoes and implications created by those fragmentary quotations, and unsupported assertions, must also be found outside the record which is before this court.

At the proper time, at a hearing on the merits, we shall gladly meet these unsupported assertions and "off-the-record" references, confident in our ability to refute or explain them. We will limit ourselves here, to such rebuttal of them as is *found in this record,* and as may be within the field of judicial notice.

We here record our protest at being placed in the position where we must either defend questions going to the merits, on *seven days' notice,* by going far afield from this record, or stand silent, leaving unchallenged, disparaging innuendoes and implications, which arise from these selected and fragmentary quotations, and these unsupported *ex parte* statements of counsel. We are confident that this court cannot be led into any fallacious consideration of issues not before it, particularly when but one side of the extraneous controversy is presented.

We are uncertain as to what constitutes the record in this case. Appended to defendants' brief are certain documents taken from the record in the *Swift* case. They were not of record in the Circuit Court of Appeals. They were not of record in the District Court, save as supplementing defendants' b ef in that court. They

were not certified by *any* clerk of *any* court until December 17, 1940. No notice of any intention to enlarge the record was ever received by us, until the brief was served upon us January 6, 1941.

If that matter *is* a part of the record here, we call attention of the court to these facts:

All of the documents and statements were filed and made *after* this suit was begun.

We attempted to make a full explanation of the reasons why we alleged no violation of the Commerce Act in our intervention; of the differences between the court and the Commission proceedings and of other matters, and we were summarily stopped by the sustained objection of one of the counsel whose name appears upon defendants' brief in this court.

ARGUMENT.

Our reply to defendants' brief will discuss, *seriatim*, the five principal divisions of defendants' brief which are entitled:

I. The difference which Armour attempts to create between the question presented by the complaint here and by the complaint in the *Swift* case does not exist.

II. The complaint presents many issues which must be decided in the first instance by the Commission.

III. The Interstate Commerce Commission has jurisdiction to decide this case. It is not an action for loss or damage to the shipments.

IV. The dismissal of the complaint should be affirmed because of the plaintiff's failure to join the Union Stock Yard & Transit Company of Chicago, an indispensable party.

V. The complaint against the trustees and receivers should be dismissed because of plaintiff's failure to obtain consent to bring this suit.

Reply to Part I, Pages 20-39.

It is impossible to know whether this case and the Swift case are grounded upon the same, or different facts.

Cases before courts or commissions are not decided on the facts pleaded. They are decided on the *evidence offered at the hearing.* That evidence may establish or completely disprove the allegations in the pleading. Counsel have attempted to prove from an *ex parte* rec-

ord that the facts *pleaded* in the two cases were similar. They have not shown that the facts *proven* in the *Swift* case were similar to those alleged by Swift, or admitted to be true in this case, by defendants' motion to dismiss.

One illustration will suffice. Suppose the Swift complaint was verbatim the complaint presented by Armour here (which it is not). Suppose Armour intervened and at the opening of the hearing, stated that the issues in the two cases were identical (which it did not). But suppose at the hearing, Swift offered its bills of lading, and those contracts directed delivery *"Care of Union Stock Yards Company,* Union Stock Yards, Illinois."

If the Armour bills of lading bore *no* such instruction, such an evidential difference would completely nullify the assumed similarity of pleadings and counsel's statement.

If their point is to be established *ex parte,* counsel must depart further from the record here. They must also supplement this record by appending the *entire record before the Commission,* for it was upon *that evidence,* not upon the pleadings, that the Commission made this finding of fact as to the Swift traffic there considered:

> "It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards *only* when complainant" (Swift) *"elects* to take delivery there."

Unless this court can find from the record before it (the Armour complaint) that Armour *also* elected to take the animals at the public stock yards, this case presents the same factual difference as was presented in the decisions of this court in *Adams* v. *Mills,* 286 U. S. 397; and in *A. T. & S. F. R.* v. *U. S.,* 295 U. S., 193 at 195, wherein it appeared that the only questions in-

volved were the rights, privileges and remedies of parties who had *demanded delivery of their livestock through the public stock yards,* and who had thereby deprived the carriers of their privilege to deliver any place else at the same station.

Before those cases can be controlling here, this court must find *from the Armour complaint,* that Armour similarly deprived the carriers of their right to make delivery at any other selected point at the *same railroad station,*—railroad team tracks, industry tracks, or newly constructed tracks and pens of the carriers. And this court must conclude that the administrative questions which may arise when a shipper demands something to which he is *not entitled as a matter of law* (*i.e.,* deilvery at a specific point within the limits of the destination station), also arise when the carrier is free to select any point within those station limits as the point of delivery.

At no point in defendants' brief do defendants challenge our interpretation of the law on this point. We argued that where a carrier is free to select any point it chooses at destination for tendering delivery, and fails to select a point where delivery may be had without extra charge, that damages arising from *their* failure to select a place where free delivery could be had, were recoverable in an action at law.

Defendants *beg this question entirely,* and devote themselves to an attempt to establish the *factual* defense that this freedom of choice was *not* open to them, because it appears from our complaint that we also deprived the carriers of this freedom of selection, by directing deliveries at the public yards.

This then becomes the focal issue in the case. If this court finds from the complaint that we did *not* demand delivery at the public yards, defendants present no ar-

gument controverting our application of the law in this respect.

We will merely comment upon the defendants' play upon the words "Union Stock Yards." At one time they use those words as descriptive of the *station* to which the animals were consigned "at which" (Rec. 7) the public stock yards are located. Again they use it as descriptive of a single point "located at" (Rec. 7) that station *viz.*, the public stock yards. We believe that a simple casual reading of paragraph 5 of the complaint, describing the railroad station "Union Stock Yards, Illinois," as the station *"at which"* the public yards are located, and describing the public stock yards as a facility *"located at"* the station, Union Stock Yards, Illinois, sufficiently differentiates between the *station* and the *public yards*, to contradict any implication created by defendants' play upon those words. If there be confusion remaining, we urge the principle that this court should interpret the complaint in the light most favorable to its author's contentions (*Grain Belt Co.* v. *Comm'r Int. Rev.*, 109 Fed. (2d) 490, at 492; *Leimer* v. *State Mut. Life Ins. Co.*, 108 Fed. (2d) 302, at 306).

Assuming that the court clearly understands that the public stock yards is *not* the tariff station "Union Stock Yards, Illinois," we shall consider the arguments advanced by defendants designed to prove that Armour, and not the carrier, selected this particular point within the station limits as the point of delivery. They are:

1. The language of certain portions of the complaint so imply (Bf. 26-29).
2. The implication that the team tracks and industry tracks, which were alternative delivering points, were not located at the station "Union Stock Yards, Illinois." (Bf. 30-32.)

3. The rates named in the contract applied only to the public yards, so delivery there must have been intended (Bf. 29).
4. Since the carriers contracted to carry to the "usual place of delivery" and the complaint alleges the public yards were the usual place, delivery at the public yards was contracted for (Bf. 32-33).
5. That Armour demanded delivery "in pens" and demanded that its livestock be unloaded, a duty incumbent on the carriers only when shipments are consigned to a public yards (Bf. 34-36).
6. The decision of this court may produce discrimination (Bf. 37-39).

We shall dispose of these contentions *seriatim*, and briefly.

1. *The complaint establishes that the railroad might have delivered Plaintiff's livestock at any point within the limits of the station "Union Stock Yards, Illinois" that it chose, and that its selection of the public yards, rather than team or industry tracks, or pens of its own at the same station, was its own deliberate act.*

In our opening brief we pointed out that this court had established that the selection of the specific place within the limits of the station "Union Stock Yards, Illinois" at which livestock would be delivered, was lawfully the carrier's privilege; and as long as no extra charge resulted from that selection, the shipper was without just cause of complaint (*Covington S. Y.* v. *Keith*, 139 U. S. 128, at 136). We cited paragraphs of the complaint in support of our assertion that Armour had in no way interfered with that right.

In defendants' brief certain other paragraphs of the complaint are referred to, in support of defendants'

claim that Armour, and *not* the carriers, directed delivery of these shipments to the public stock yards.

The substance of those cited paragraphs is:

1. (Par. 3) That each defendant uses a common depot or station at the destination, Union Stock Yards, Illinois.

2. (Par. 4) That such defendants' depot is owned and operated by the Stock Yards Company, and that the stock yard facilities have been designated and used by *defendants,* as their station for the delivery of livestock to commission merchants, packers and others *buying and selling livestock at Union Stock Yards.*

3. (Par. 7) That at no time do, or have, any of the *defendants* provided any other unloading facilities at the station Union Stock Yards, Illinois.

4. (Par. 19) That each *defendant* well knew it owned or operated no loading facilities at said station.

Each of these paragraphs allege an *act or omission* of the *defendant.* And from the fact that *defendants refused* to provide any free delivering facility, or any facility *other than* the public yards, at shippers' expense, defendants reason that Armour blindly accepted that refusal and, by billing its shipment to the station "at which" these public yards were located, also selected the yards. Thus, the very breach upon which plaintiff's cause of action is grounded, is sought to be converted into an estoppel.

There should be no occasion to quibble over what Armour's demand was. It is pleaded, in *haec verba* (Rec. 32, 33) and again by summary (Rec. 11). The

demand was specifically for delivery at the "pens of the carriers." (Rec. 33) Paragraph 4 of the complaint specifically states that the public stock yards were *not* the pens of the carriers.

The explanation of its demand (Rec. 36) stated that any delivery to the Stock Yards Company would constitute a conversion of Armour's property. Again the right of the carrier to select the yards and pay for them was reserved by the parenthetical phrase "(other than delivery * * * to the * * * Stock Yards Company *as your agent for unloading and delivery to us*)." These are the verbatim demands made by Armour on May 25, 1933.

The prayer of the complaint is the demand Armour made when this suit was filed. It was:

> "2. That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it at Union Stock Yards, Illinois, at the unloading pens *of the Defendants* in *the* Union Stock Yards, Chicago, Illinois, *or at such other point as same may be tendered,* upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company *or of any other person, firm or corporation.*"

If Armour was demanding delivery only at the public yards, what is the significance of the words italicized above?

The complaint alleges that the public stock yards were *not* the pens "of the carriers" (Rec. 6). And that carriers owned or controlled *no* pens in the public stock yards (Rec. 35). How could a demand for delivery at the "carriers pens" be construed as a demand for delivery at the public stock yards?

The Stock Yards Company, hearing of this controversy, was quick to note Armour's demand for delivery at "pens of the carriers," and to *deny the existence of any such "carriers' pens"* on Stock Yards property (Rec. 35). In view of these facts how could the demand for delivery at "pens of the carriers" be construed a demand for delivery in the public stock yards?

The Yards Company threatened to retain possession of every animal *"consigned to the yards of this Company"* (Rec. 35). Counsel would have the court believe that with such information at its disposal Armour continued to consign its shipments "to the yards of this company," and still seek to recover charges resulting from its (Armour's) own voluntary selection in this respect.

The complaint alleges just what Armour did after receipt of this notice: It "notified each of said defendants" of the position taken by the Yards Company, and notified defendants to *deliver Armour's stock to the Yards Company at their peril* (Rec. 12, 36, 37).

Are these admitted facts consistent with defendants' theory that Armour, and not the carriers, elected to take delivery at the public stock yards?

2. *Defendants' implication that there were no team tracks or other points available for delivery of live stock at this station is pure assumption.*

Defendants carefully refrain from any positive assertion that there are no team tracks, or no industry tracks, or other available places for delivery at the tariff station "Union Stock Yards, Illinois." They refer to a finding of the Commission referring to the choice which a shipper had of taking delivery at team tracks, in Chicago, *not* at the Union Stock Yards, or delivery to Armour's own plant (Bf. 31). They accuse us of

attempting to *leave the inference* that there were team tracks at the station "Union Stock Yards, Illinois," and that Armour's industry tracks were also at Union Stock Yards, Illinois.

We plead guilty. That is exactly the inference which is left by our brief. We do not retract it. On the merits, the court will have before it evidence of the truth or falsity of that inference. It can determine whether or not there were other available places of delivery at "Union Stock Yards, Illinois" than the public stock yards.

For the present record, this court has only the information that there was a tariff station named "Union Stock Yards, Illinois" to which this freight was consigned (Rec. 9). It knows that "located at" this station was a public stock yards (Rec. 7). Whether the limits of that station were coextensive to the limits of Cook County, Illinois, or with the limits of the public stock yards is not disclosed. On the merits, if it shall appear that the station limits were coextensive with Cook County, Illinois, one conclusion will follow. If coextensive only with the public stock yards, a different conclusion will result. We cannot imagine that this court will indulge in the assumption made by defendants (that the limits of the station and of the public yards were coextensive), any more than it will assume that the station limits extended to the Mississippi River.

The prayer of the complaint establishes that the station limits were wider than the limits of the public yards. The demand is that livestock consigned to the station, "Union Stock Yards, Illinois" be delivered *either* in the public stock yards, *"or at such other point as same may be tendered"* free of any charge except the applicable freight rates (Rec. 21). This prayer is confined to shipments consigned to the station "Union Stock Yards, Illinois." Obviously there must be some "other point"

at that station, besides the public yard, or the prayer is meaningless. It may be that the tariffs offered in evidence will establish those limits. It may be that they are established by years of custom and usage. For the present it is only important to note that they are *not* merely the public stock yards.

3. *The complaint evidences Armour's willingness to pay the rate applicable to any delivering point selected by the carriers assuming a difference in rate existed.*

On numerous occasions defendants assert that the rate named in the contracts applied *only* to the public yards. Their sole record reference to any of these assertions is "(Par. 19, Rec. 13)." We find no authority there, or elsewhere, for the statement that the rate named in the contract applied *only* to the public yards.

The sole reference to rate found in that paragraph is in connection with the carriers' knowledge. It is stated that defendants knew they had no other facilities through which they could effect delivery "for the consideration named in such contracts"; knew that *if* they used the public yards, an additional non-tariff charge would be made; notwithstanding which the carriers refused to provide at the station Union Stock Yards, Illinois, *any* depot or platform, pens or facilities, at or through which a free delivery could be had at the charges *lawfully applicable to such* transportation under such written contracts (Rec. 14).

Even if it appear on final hearing that one rate applied only to the public yards, another to team tracks, another to Armour's private siding, at this station, the complaint evidences a willingness to pay the rate *lawfully applicable* whatever it might be, and sought delivery at *that* rate, whatever it was. Of course, there is no basis for our assumption in this record, but if

there were, this argument of defendants is yet without significance.

Our definition of the terms used in our opening brief is assailed because we use "an interpretation of the complaint which the lower court rejected." That is true, and that rejection is the matter here under review.

4. *The carriers were free to establish any "usual place of delivery" they pleased.*

The complaint alleges that carriers contracted to carry to "their usual place of delivery." The complaint alleges that the public yards, was the usual place of delivery. From this, the defendants reason that Armour consigned the traffic to the public yards.

No demand was made by Armour to deliver at the public yards. No unconditional demand was made by Armour *not* to deliver at the public yards. The carriers were left free to use any "usual place of delivery" provided they made a *lawful* delivery at that point. This, they could have accomplished by arranging with their agent for the use of the Yards property, and paying the cost thereof.

The complaint is directed at the carriers' *failure to make any delivery at all.* When the cars arrived they were not tendered to Armour (Rec. 13). While the animals were still in the carriers' cars on carriers' tracks, they were unqualifiedly handed over to the Yards Company. Not until that had been done was any tender ever made to Armour, and then the tender was conditioned upon the payment of ransom. Defendants knew this would happen, so their alleged delivery was no delivery to Armour at all. It was a misdelivery to the Yards Company, and it remained a misdelivery until the railroad paid the demands of its agent so that free delivery to Armour could be made.

5. *The complaint evidences no demand for unloading services or for delivery "in" pens.*

Counsel reason that since Armour demanded unloading of its animals and since unloading was required only at public stock yards, Armour's demand must have been for delivery at the public yards.

Armour's demand was stated in plain English (Rec. 32, 33). First it was for delivery *at* "pens of the carriers." The obligation to load and unload was *controlled by the specific terms of the bill of lading* (Rec. 29) and depended upon where the "pens of the carriers" were located at destination. If the carrier selected a public stock yards as the "pens of the carriers" Armour was entitled to free unloading. If the carrier provided a pen elsewhere, the unloading fell upon Armour, by specific provision of the bill of lading (Rec. 29), by which Armour was bound.

How can it be said that Armour "demanded unloading," when the bill of lading controlled entirely?

The argument that Armour demanded delivery "in pens"; that only at public yards were the carriers required to unload and tender "in" pens; that therefore Armour demanded delivery at public yards, is grounded upon the substitution of a different preposition than the one used in the complaint.

There is nothing in that demand requiring delivery to be made *in* the delivering pens of the carrier as counsel assert. The demand was for delivery *at* such pens (Rec. 35). The spotting of a loaded car adjacent to such a "carrier's pen" would be delivery *at* such a pen, not *in* it. By changing the preposition, counsel has distorted Armour's demand to one for delivery *in* carrier's pens. And this distortion constitutes the first step in the reasoning recited in the preceding paragraph.

The specific demand made by Armour was for delivery "*at* the pens of the carrier" (Rec. 33). Its prayer in this complaint is for delivery "*at* the unloading pens of the Defendant * * * or *at* such other point" (Rec. 21). Obviously a car spotted *at* a pen designed for unloading and made available to the consignee for unloading is tendered for delivery. This is all that was ever demanded by Armour. The privilege was never granted.

Defendants' argument, based on an incomplete quotation of Armour's demands, *if* the carriers chose to use the public yards, is again advanced to discount the actual demand made, both in the letters of Armour (Rec. 33, 36) and in the prayer of the complaint (Rec. 21). It ignores what Armour demanded *if* the carriers chose to deliver elsewhere.

Armour's subsequent letter of May 16, 1933 (Rec. 36) utterly destroys the fiction created by counsels' disregard of prepositions. At that time the carriers were advised that if they continued to elect to turn Armour's property over to the Yards Company, they would be unloading it at a point where no one was authorized to receive it, and that any expense resulting from such action would be for their account (Rec. 36).

The prayer of the complaint asking for a decree, that Armour was entitled to delivery *at* (*not* in), the unloading pens *of the defendants,* in *the* Union Stock Yards (*i. e.* the public stock yards) *or at such other point* (*not* pen) *at* which (not *in* which) same may be tendered (Rec. 21) negatives any demand for unloading service, or for delivery "*in*" any particular pen or at any particular point within the station limits.

6. *The argument that discrimination may result from this court's decision is untenable.*

Keeping in mind that the sole legal question involved here is that established by this court in *Covington Stock Yards* v. *Keith,* 139 U. S. 128, repeatedly and recently cited by this court with approval, (*viz.*, that a carrier selecting a point for delivery of live stock is bound by law to select a point where free delivery can be effected), it is apparent that the only discrimination that can result from enforcing that legal principle in Armour's behalf, must arise only when some other shipper *similarly situated,* waives his right to the same privilege.

A shipper who deprives a carrier of that privilege of selecting the point of delivery (such as Swift and Company; such as the consignee in *A. T. & S. F. Ry.* v. *U. S.,* 295 U. S. 193 at 195; and the consignees in *Adams* v. *Mills,* 286 U. S. 397) is not possessed of the same legal rights and remedies as one who, like Armour, preserves the carrier's right of selection. Nor are the carriers under the same legal duties to one who demands delivery at a specific point and refuses any other delivery. It might properly be held that though a carrier is duty bound to select a point where free delivery can be had, it is not so bound, when a shipper selects, and impliedly assumes the extra costs arising at a point of delivery the shipper has selected.

The alleged discrimination referred to by defendants is merely a difference in the legal status of one shipper who contracts with the carrier *and* the Yards Company, as compared to another shipper who contracts *only* with the carrier. Such differences are not discriminatory. If Swift and Company, shippers to the market for sale, the Hygrade Company, and others, "elect to take delivery there" (at the public yards (Rec. 112)), they

must stand the legal consequences of their election. Because Armour, and the owners of "more than one-third of the direct shipments of livestock arriving at Chicago" (Rec. 112) elect to take them elsewhere, or leave it to the carrier to decide, it does not follow that their legal rights are limited by an election which they did not make. The discrimination referred to is that which results when one passenger chooses to ride in a day coach and another in a private car. Similarity of service is a condition precedent to undue discrimination.

Reply to Part II, Pages 39-66, Defendants' Brief.

There are no administrative questions presented by the complaint.

Defendants urge four administrative questions which they assert are inherent in the decision of the case at bar. These are:

1. Where does the transportation of the animals end?
2. What delivering facilities are reasonable?
3. What allowance should reasonably be made to Armour?
4. Were the freight rates paid reasonable?

All of these questions are said to arise from the allegations of the complaint, although no specific reference is given to the allegations raising these questions.

Treating these questions collectively, every one of them is grounded upon the false premise that Armour directed delivery of the animals at the public stock yard, and that because of that direction Armour's rights became indefinite. Only on that assumption is there any question of whether transportation ends in the Yards Company's unloading pens, or elsewhere in the stock yards. Only on that assumption is the suitability of the Yards Company's pens relevant. Only on that assumption can the theory of "allowance" be urged. And

only upon that assumption can the reasonableness of the rate be said to be involved.

Waiving the irrelevance of the four points by reason of the false premise upon which they are based, there are other and additional grounds, establishing the unsoundness of defendants' arguments, to which we shall briefly refer.

1. *The complaint calls for no decision of "where transportation ends."*

The cases cited by defendants do not support their statement that a court cannot decide in the first instance where transportation ends. Those decisions go no further than to hold that the Commission *has power* to decide the question, in a case properly before it, when that question is relevant.

This we concede. But in *no* case have the courts held that such power of the Commission is *exclusive*.

There is scarcely a case brought, involving the loss or damage to property in a carrier's freight house, in which the courts are not called upon to decide whether (a) the transportation had ended, or not begun, and the carrier's liability was that of warehousemen only or (b) the transportation had not ended or had begun, and the carrier was the insurer. As typical of many such cases we cite the decisions of this court in *Michigan Central R. Co.* v. *Owen,* 256 U. S. 427; and *Y. & M. V. Ry.* v. *Nichols,* 256 U. S. 540. The court there construed the bill of lading and decided the carrier's liability according to its terms, as we request the court to do here.

If the carrier did not deliver Armour's animals to the Yards Company, as their selected agent, their last connection with that property was while the animals were in *their* cars, on *their* track (Rec. 10). At that moment no tender had yet been made to Armour, at any point.

Certainly transportation had *not* ended at that time, when the wrongful act was committed. The animals were then placed in complete custody and control of the Yards Company, the carrier well knowing that no free delivery would *ever be made to Armour thereafter.*

The first question is whether, in so acting, the carrier fulfilled its contract to transport and deliver to Armour, for the applicable freight rate. That is solely a question of law. An auxiliary question is whether such conduct was in compliance with the duties which the common law imposes upon a common carrier. That is solely a question of law.

To hold that either of these questions were for the Commission would be to vest in the Commission jurisdiction of every action for damage resulting from a carrier's breach of its contracts or of its common carrier duties.

Many duties may be imposed on the carrier because of the requirement of reasonableness. Such a question may be presented when a shipper selects a specific point of delivery and demands delivery there. The carrier may or may not be required to absorb the expense of such delivery, depending upon whether such delivery is reasonable or unreasonable.

But the law does not empower the Commission to *absolve a carrier from the duty to make any delivery at all.* And these carriers made no lawful delivery at all. They turned our property over to a third person, not our agent, *before* offering it to us, and left us as best we could, to get that delivery of our property, for which we had paid the carrier. Only the courts may decide the legal effect of such conduct, and measure the damages arising therefrom. There is no question here of where transportation ends. It is whether a contract was performed or not performed. This is a simple legal question.

2. *There is no question as to the reasonableness or adequacy of the terminal facilities furnished.*

The same situation exists as to the reasonableness of the delivering facilities furnished. The complaint does not assert that the delivering facilities furnished were insufficient or inadequate. It asserts that *no* delivering facilities were *furnished at all.*

Had the defendants, after engaging the Yards Company pens, paid for them, and were we here asserting that they were not reasonable or suitable, a different question might arise. But the breach alleged in the complaint is the failure to furnish *any pens at all,* into which the animals might be unloaded, or *at* which (not *in* which) delivery might be tendered to Armour, without the imposition of an extra charge. This statement appears in Pars. 19 and 28 (Rec. 14, 17) of the complaint in positive and definite language.

The damages sought here are the cost to the complainant of the delivering facilities which the carriers elected to use; which they *should* have furnished without charge to Armour, regardless of whether they were at the public stock yards or elsewhere at the destination station.

3. *Armour rendered no service on these shipments and claims no "allowance."*

A consideration of what constitutes an "allowance" paid by a carrier to a shipper, disposes of this argument instanter.

The "allowances" of which the Commission has jurisdiction are defined in the Act as follows:

"Sec. 15 (13):

If the owner of property transported under this part directly or indirectly renders any service con-

> nected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Armour rendered no service upon these shipments. It furnished no facilities, by itself or through any agent, used by the shipments. The facilities furnished were furnished by a third person, *not Armour's agent*, at the instance of the railroads. The railroads failed to pay for the facilities which they had engaged. Armour merely paid the railroads' debt as a condition precedent to obtaining that possession of its own property, which it was lawfully entitled to receive from the railroads without payment of *any* charge save the rates applicable under the tariffs, which were paid.

If such damages constitute an "allowance" then every monetary compensation paid to shippers by carriers, for damages resulting from loss or destruction of, or damage to property, or for damages resulting from delay, or from delivery to the wrong person, or at the wrong station are also "allowances," and the jurisdiction of the courts over all such controversies between shippers and carriers is ended.

What we have said as to allowances also applies to defendants' assertions that payments of the amounts sought would constitute a "rebate" from the line-haul rate. If so then every payment made for lost or damaged property, or erroneous or wrongful delivery is also a rebate in violation of the Commerce Act, unless approved by the Commission.

4. *The reasonableness of no rate is involved.*

Commingled with defendants' foregoing argument is the claim that the case requires some consideration of whether the line-haul rates were reasonable or unreasonable.

This argument is predicated solely on the assumption that the amounts paid by Armour were for services and facilities rendered between the Yards Company's unloading pens, *into which it is assumed* Armour ordered them, and the boundaries of stock yards property.

Defendant points to no paragraph of the complaint asserting that any rate or charge paid by Armour to the railroads or to the Yards Company was unreasonable. The Circuit Court of Appeals found that no such claim was made (Rec. 81). The fiction of unreasonableness is created by pure assumption—assumption that a question exists whether it is reasonable to charge more than the line-haul rate for furnishing ingress to and egress from the Yards Company's pens, *into which it is assumed Armour ordered them.*

The entire fallacy is disclosed when we assume that the carrier, instead of delivering to the unloading pens, had spotted the car on a team track or on Armour's sidetrack, and there tendered them to Armour. That option was open to defendants. Had they exercised it, could this complicated argument as to "reasonableness of the rate charged for using the public yards, have been made? Obviously not.

It follows that the carriers argue that they may *import* questions of reasonableness into their dealings or not, dependent upon *whether they select one point of delivery or another.* The jurisdiction of the courts and of the Commission cannot depend upon the carriers' whim.

Summarizing:

Every one of the four arguments we have just discussed; where transportation ends; what delivery facilities are reasonable; whether an allowance is sought; or whether the rates were reasonable; spring from the deliberate use of the public stock yards by the carriers. Not one of the arguments advanced could exist, had the carriers elected to deliver elsewhere at this sttaion. Then, there would have been no unloading, no question of crossing Yards Company property, no question of allowance.

All of these arguments are an attempt of the carriers to lift themselves by their own boot straps. *They* chose the public stock yards. By that choice they made all of these arguments possible. Had they chosen a different point and means of tendering delivery, every argument they advance would become instantly moot.

We do not believe this court will permit these carriers to control the tribunals in which they may be made to respond, merely by the selections which they make, as to the manner in which they choose to break their written contracts and breach their common law duties.

5. *No demand was made by Armour which could not be legally made by any consignee on any carrier, at any station.*

For the first time in the history of this proceeding, defendants have undertaken to face the situation which is created when it is realized that there *were* other places than the public yards at the station "Union Stock Yards, Illinois" at which delivery of these shipments might have been tendered to Armour.

Stressing the point that Armour could have *directed* deliveries at other points, and ignoring the thought that carriers too could have selected such other points had

they wished; and ignoring the possibility of team track delivery (which the Commission found was being extended to other packers); and ignoring the possibility of delivery on Armour's own tracks at the applicable rate; counsel considers the idea of the carrier constructing some pens of its own at this station.

From this limited point of view it is asserted that the complaint seeks an injunction directing the carriers to build such pens, and damages for their past failure to build them. And upon this assumption of a demand that was never made, the defendants proceed to argue:

1. That only the Commission could command the carriers to build such pens.
2. That only the Commission may determine whether the facilities existing elsewhere in the *Chicago district* (not merely at the station "Union Stock Yards, Illinois") are adequate.
3. That only the Commission can decide what the freight rate should be to such newly constructed facilities.
4. That only the Commission could find the station limits within which these facilities should be built.

Underlying all of these points is the assumption that Armour demanded pens to be built. Armour's demands would have permitted the Yards Company's pens to be used* or leased; it would have permitted the same ten-

* If we may assume that this court will take judicial notice of decisions of the Commission, issued and printed under authority of Congress, the court may know that during a considerable portion of the time here involved, the Stock Yards Company, by tariff filed with the Secretary of Agriculture, held themselves out, for $3.00 per car, not only to unload and count the animals, notify the consignee of arrival, furnish lists of dead and crippled animals to carriers, furnish weights on directs, collect and remit freight charges on such livestock, but also to furnish "as the railroad's agent *such services and facilities as the railroad is required to furnish in making delivery of such livestock to consignee thereof.*" (See *Livestock to and From Union Stock Yards, Chicago*, 222 I. C. C. 765 at 769.

der of delivery on team tracks at this station that other packers were receiving (Rec. 112); or it would have permitted delivery on Armour's own track. In any of these events the argument made under this heading would be moot. The complaint asked no pens to be built. It asked only that some method be adopted under which the carrier will *observe its legal obligation* to make a free delivery of property it transports to this station "Union Stock Yards, Illinois."

The obligation to furnish some such facilities at some point within the limits of a station to which a carrier publishes rates is absolute and is imposed by law. If none exist, but such are demanded, the law requires the carrier to either *provide such facilities* or *cancel its rate and retire from transportation to that station.* These carriers did neither.

We concede that had the carriers built such pens, and believed that their rate was thereafter unremunerative, they could have then applied to the Commission for a rate increase; and that the Commission alone could have decided the measure of the rate to be applied. But this situation *never arose.*

To argue that the Commission could relieve the carriers from this common law duty, is to endow the Commission with powers to overturn the repeated decisions of this court (*Covington Stock Yards* v. *Keith,* 139 U. S. 128; *Erie R. R.* v. *Shuart,* 250 U. S. 465; *U. S. Y. & T. Co.* v. *United States,* 308 U. S. 213 at 219), and excuse the carriers from duties imposed by this court.

One other false assumption is indulged in. It is said that the Commission must fix the limits of the station "Union Stock Yards, Illinois," because this court so held in *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247. The decision refers to a case where *no tariff named the station limits.* Such is not shown to

be the case here. If such situation appear perhaps the court should then "stay its hand" (as this court suggested in *Gen. Am. T. C. Corp.* v. *El Dorado T. Co.*, 308 U. S. 422). But time for that situation will not arrive until hearing on the merits.

6. *There is no violation of the Commerce Act involved, so the essential requirement for Commission jurisdiction is not here.*

Reply to the third major division of defendants' brief is made simple because of the fact that defendants take *no issue with the law* as stated by us, in our prior briefs herein (Pg. 12, et seq., Bf. in support of petition; Pg. 14, Bf. for petitioner), *viz.*:

> "The cases of which the Commission has exclusive jurisdiction have recognized fundamental characteristics:
>
> (1) They must involve *some* violation of *some* provision of the Commerce Act by a common carrier subject thereto.
>
> (2) The violation of the Act must be one which exists or does not exist, depending upon whether, in the administrative judgment of the deciding tribunal, the evidence warrants the factual conclusion that the acts complained of fell within a generic description, forbidden by the Act; *i.e.*, unreasonable, preferential, etc.
>
> If either of these conditions be absent, there can be no exclusive jurisdiction by the Commission."

Apparently conceding the accuracy of this point defendants choose to argue that the requirements of the law as above stated, are met here. The following asserted violations of the Act are said to be alleged in the complaint:

1. That the *Swift* case alleged unreasonableness in violation of the Act, and Armour intervened in the *Swift* case.
2. The practice of making deliveries at the public stock yards involves questions of reasonableness under the Commerce Act.
3. The charges paid by Armour were for transportation services, and were not filed with the Commission. Therefore an overcharge exists which is in violation of the Commerce Act.*
4. Armour relies upon Section 15(5) of the Act, requiring carriers to unload at public stock yards.
5. Armour asserts that the services for which the yardage charges were paid were services included in transportation as defined by the Act.
6. Armour demands an allowance, provided by the Act.

Replying:

1. Armour asserted no violations of the Act in the *Swift* case.

The Armour petition in the *Swift* case specifically refrained from any concurrence in the only paragraph in the Swift complaint, alleging any violation of the Commerce Act (Def. Brief, Appendix Pg. XVII). It asked no relief at the hands of the Commission. Even had Armour not thus refrained from alleging any violation of the Commerce Act, or from asking any relief of any sort from the Commission, it would not be barred from electing its remedies. It had *first* elected its remedy in court. Any estoppel would run against its second selection.

*This is the sole violation of the Act found to exist by the Circuit Court.

Armour's statements before the Commission were never of record before the Circuit Court of Appeals. They were never of record in the District Court save as part of defendants' brief. They were never certified to in *any* court, by *any* clerk of any court until December 17th, 1940 and no notice of their inclusion in any record in this court was ever received by us until January 6th, 1941, one week before the week set for argument before this court.

Waiving the impropriety of those asserting facts now, they throw no light upon whether or not the complaint before this court states a cause of action of which the courts of law have original jurisdiction. Since they are moot to any question before this court, we dismiss them, with the assurance that at the proper time, on the merits, we shall completely refute the innuendoes created by this last-minute insertion in this record, merely by proper and timely reference to other portions of that record which counsel have omitted from their present eleventh-hour presentation.

2. The reasonableness of no "practice" at any public yard need be determined.

The entire argument as to reasonableness assumes deliveries at the public yards. When no such delivery is demanded by consignee, but result solely from the option of the carrier, the question of reasonableness under the Commerce Act cannot arise, unless this court will permit the carriers to *control the tribunal in which they must answer, by making one selection as to one shipment, and a different selection as to another,* thus sending one shipper to the Commission, and another to court, with the same cause of action for breach of contract and common law duty.

3. No transportation contract ever existed between Armour, and the person to whom the charges were paid with reference to these shipments.

The charges paid by Armour were for no transportation service for which Armour ever made any contract. The sole person contracting for any stock yard service was the railroad. The charges paid by Armour were ransom, pure and simple. They were analogous to drayage charges incurred because the carrier had dumped Armour's property at the wrong station.

4. Entire compliance, and not violation of Section 15(5) is asserted in the complaint.

The complaint alleges that having selected the public yards as their delivery point, the carriers fully observed and complied with Section 15(5). A *violation* of that section would be required as a condition precedent to Commission jurisdiction.

(Query: If a carrier failed to unload at a public yard, as required by Section 15(5), would a suit for resulting damages necessarily involve such complicated facts, that the courts would be incompetent to pass upon the factual question of whether the animals were unloaded or not as the law required?)

5. The services of the Yards Company were no part of the transportation for which Armour contracted.

Armour makes no allegation that the services of the stock yard company are necessarily a part of transportation. It contends merely that the common law requires the carrier to provide *some* delivering facilities, *some*where at the destination station. And it contends that it pays for such facilities in the transportation rate. Therefore it is carriers' duty to provide them.

The carrier cannot escape this legal duty by selecting a public stock yard, and thus impose the costs resulting from its selection upon the shipper.

6. No allowance is involved.

We have previously shown that Armour rendered no service to the animals in question on carrier's behalf, and asks no allowance.

Summarizing:

Each of the points above discussed would be moot, once had the carrier, instead of choosing the public yards as its delivery point, chosen a team track, Armour's siding, or new pens of its own, at the same station. Had they offered delivery at Armour's siding, or on team tracks, the *Swift* case involving deliveries at public yards; the practices at public stock yards; Section 15(5), and the other subject advanced would be wholly irrelevant to any question presented.

Can the carriers, *create* these questions merely by a conscious selection of the stock yards as their point of delivery?

Reply to Part III, Pages 66-79, Defendants' Brief.

The complaint sets forth a simple action for damages from misdelivery.

Defendants attempt to remove this cause from the rule announced by this court in the *Galveston* and *Shuart* cases (223 U. S. 481; 250 U. S. 465) produces a novel conception of loss or damage. It seems to be counsels' theory that unless the *goods themselves* be lost or injured, that there can be no application of the cases cited.

Loss or damage may occur to a shipper when the goods themselves are intact. Thus in *C. M. & St. P. R. Co.* v. *McCaull-Dinsmore,* 253 U. S. 97, decided by this court, the goods were in first class condition, but they

had been negligently delayed by the carriers. A market decline occurred after the goods should have arrived. Under counsels' theory that case should have gone to the Commission, because no injury occurred to the *goods*.

Another frequent cause of damage is misdelivery at the wrong station, necessitating drayage or other transportation expense, to get the goods to the correct destination. Yet the goods themselves are unharmed.

"Loss and Damage" cases include these and many other cases where, though the goods were finally received uninjured, the owner has suffered pecuniary loss which, but for the carrier's breach of duty he would not have suffered. In the case at bar, Armour was compelled to buy that possession of its own property, which it was legally entitled to receive from the carrier without extra charge. The cause of that expenditure was basically, the carriers' total failure to provide at this station any facilities for free delivery which the law required them to furnish; and, directly, their delivery of Armour's property to a third person, with full knowledge that Armour would never receive it save by payment of ransom to such third person.

1. The substance, as well as the form of statement, of the case at bar, brings the case squarely within the principle announced by this court in *Galveston, Harrisburgh and San Antonio R.* v. *Wallace* (223 U. S. 481).

We concede that the mere fact that we rely upon a common law right is not sufficient to qualify the court of law as the tribunal empowered to try the case. The original *Abilene* case was based upon the plaintiff's common law right to a reasonable rate. The principle there laid down that where the existence or non-existence of the right required the experienced judgment of the Com-

mission, and where it was necessary to reach an intermediate factual conclusion (of reasonableness) before the legal conclusion (of unlawfulness) could be reached, primary resort must be had to the Commission.

The *Galveston* case (223 U. S. 48.) was decided by this court *after* the *Abilene* case. There, as here, the carriers argued that the mere fact that the shipper relied upon his common law right to receive delivery of his property did not remove the case from the category of those covered by the *Abilene* case. This court quickly disposed of that argument as follows, at page 491 (emphasis supplied) (page 490):

> "But damage caused by failure to deliver goods is in *no way traceable to a violation of the Commerce Act,* and is *not* therefore within the provisions of Sections 8 and 9 of the *Act to Regulate Commerce.* (*Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 208.)"

Here, the carriers failed to deliver Armour's goods as their contract and common law duties, and as the Federal Bills of Lading Act required them to do. As a result Armour was compelled to *buy* that possession of its property, which it was entitled to receive under the line-haul rate. The carriers' failure to perform their legal duties was the sole and direct cause of that unwarranted payment of the money here sought to be recovered.

If we may substitute "misdelivery of" for "failure to deliver" in the above quotation this case becomes res adjudicata.

Reply to Part IV, Pages 79-85, Defendants' Brief.

The Stock Yards Company was not a necessary party defendant.

In our original brief (page 27) we fully covered the error in the opinion of the District Court in this regard.

Attempting to refute this argument, defendants have urged ten points, *viz.*:

1. That a contractual obligation, made in 1892, to use the yards, bound Armour to such use.
2. That the complaint alleges that no other facilities were available for delivery at this station.
3. That defendants do not control the assessment of yardage charges published and filed with the Secretary of Agriculture.
4. The complaint asks the court to hold the yardage charge unlawful, and the practices of the Yards Company wrongful.
5. The plaintiff is asking the court to adjudge that plaintiff is entitled to consign its livestock for delivery *at the Union Stock Yards,* and to receive them without paying the tariff yardage charges, and to order free egress to be provided, etc.
6. It would be utterly impossible for the carriers to obey the injunction asked for, unless also directed against the Yards Company.
7. If the injunction were issued, and the Yards Company demanded exorbitant charges the railroads would be helpless.
8. Plaintiff addressed its demand to the Yards Company as well as the railroads.
9. The Yards Company was a party to *Atchison, T. & S. F.* v. *U. S.,* 295 U. S. 193 and to *Adams* v. *Mills,* 286 U. S. 374.
10. The complaint asks freedom of plaintiff's property from any lien of the Yards Company.

These arguments may be answered collectively by calling attention to the fact that the carriers were *never required to go near the stock yards property in order*

to tender delivery of Armour's animals. The carriers went there of their own choice, against Armour's will, rather than tender delivery to Armour elsewhere at the same station. By making a *different choice, they may relieve themselves* from the sad predicament they picture.

But, there are additional answers to these claims. Many of them are grounded upon fragmentary quotations from the record. When the quotation is completed the argument is refuted. Others are grounded upon facts not of record in this case. Others are without any factual foundation whatever, save the unsworn statement of counsel. We will touch upon each of the ten points above named very briefly.

1. The "contractual obligation" referred to, between Armour and the Yards Company, is not of record in this case. Supporting reference is not made to the record here, but to the Commission's decision on a *different* record, not before the court here.

The contract referred to in that decision is alleged to have been made in *1892*. It does not appear that the plaintiff corporation was then in existence. Only on the merits can this be determined. The contract referred expired in 1907. Any renewal of continuance of that contract was made impossible by the decision of this court in *U. S.* v. *U. S. Y. & T. Co.*, 226 U. S. 286. The court has nothing before it now, warranting either counsels', or the Commission's statement that after the contract had expired, and its extension declared void, that there remained any obligation binding this plaintiff to use the yards in perpetuity.

If there were any such agreement, the defendants will have ample time to assert any estoppel created by it, at hearing on the merits. Certainly there is nothing of record before this court now, upon which this court may adjudicate that question on motion to dismiss.

2. Not only does the complaint state that there were no other unloading facilities in existence at this station, but it asserts that carriers refused to provide any others at this station, or to pay for the one they elected to use. Counsel's reasoning, that because there were no other facilities in existence, the use of such facilities was imperative is a *non sequitur,* and entirely overlooks the ability of the carrier to provide other facilities either by lease, construction, team track or industry track delivery or otherwise or failing in this, their right to cancel their published rate. Whether by reason of congestion of buildings, excessive cost or otherwise, the carriers were unable to provide other facilities, is a matter for consideration on the merits, not on motion to dismiss.

3. Defendants, and defendants only, controlled the assessment of yardage charges on the shipments in question. By stubbornly continuing to deliver Armour's property to the public yards, they caused these tariff charges to become applicable. Had they tendered delivery elsewhere (as they were free to do) no such charges could have become applicable.

4. No reference is made to any statement in the complaint attacking the lawfulness of the yardage charges, or the practices of the Yards Company. We concede both to have been entirely reasonable and lawful. Our complaint arises because of the conduct of the carriers, by reason of which these lawful charges became a lien upon our property against our will.

5. Defendants resort to the device of fragmentary quotation, and unsupported statements, in their attempt to support their assertion that Armour asks delivery of its animals "at the Union Stock Yards" without payment of the tariff charges of the Yards Company.

In quoting from our complaint, counsel constantly

omits and ignores the alternatives appearing in italics below:

> "* * * free from any lien or claim of the Stock Yards Company, *or of any other person, firm or corporation.*"
>
> "* * * without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company, *or any other person, firm or corporation.*"

The complaint asks freedom from extra charge by *anybody*. The fragmentary method of quotation distorts the meaning so as to limit the prayer to cover Stock Yards deliveries only.

We do ask recovery of damages for past payments of yardage charges to the Stock Yards Company, as that happens to be the measure of damage suffered by reason of carriers' failure to tender the free delivery of our property to which we were legally entitled.

6, 7. The argument that carriers cannot obey the injunction prayer, or would be helpless against exorbitant charges, unless the Yards Company be a party, is absurd. The carriers have clear remedies open to them.

(1) They may deliver elsewhere at the same station and *stop hiring* the Yards Company.

(2) As patrons of the Yards Company, a proceeding before the Secretary of Agriculture protects them against any unreasonable charges by that Company.

No question of "suitable egress" from the property of the Yards Company appears, until after the carriers have chosen to deliver Armour's livestock to the Yards Company, upon their property.

8. The statement that our original "demand" was also addressed to the Yards Company, is pure fiction, and

may be so proven from the record. Having made our demand upon the principals (the carriers) our letter to the Yards Company was merely a notice of our intention, and a *statement of fact*. No demand of any kind can be read into the language of that notice to the Yards Company (Rec. 34, 35).

9. The Yards Company was a party to the *Atchison* and *Adams* cases, because, as we have shown, in those cases delivery at that specific point was demanded or acquiesced in by the shipper. There was in those cases the "tri-party relationship" to which the Circuit Court referred. No such relationship, or no contractual relationship of any kind existed here, between Armour and the Yards Company.

Reply to Part V of Defendants' Brief.

The receiver and trustee defendant are properly sued.

To support their contention that the Federal receiver and trustees may not be sued without consent of their appointing courts, defendants cite the decision of this court in *Barton* v. *Barbour,* 104 U. S. 126, decided in 1881.

Section 65 of the Judicial Code was enacted *after* that decision. It requires all Federal receivers and trustees to "manage and operate" the property in their possession "*according to the valid laws* of the state in which the property shall be situated in the *same manner* that the *owner or possessor thereof would be bound to do* * * *." (It is axiomatic that a Federal receiver must obey the Federal Law.)

The state and Federal law required the original owners and possessors of these properties to *provide a place for the free delivery of livestock transported by them.* This statute imposed the same obligation upon these receivers and trustees.

Section 66 of the same act, also enacted *after* the decision in the *Barbour* case, authorizes any suit, arising out of any act done "in carrying on the business connected with such property" to be brought against such appointees without consent of the appointing court.

This suit arises from the failure of these trustees, in carrying on their railroad business, to observe the requirements of the law with respect to furnishing a place for the free delivery of property transported. The alleged interference with their management is the *interference of the law,* designed to prevent such appointees from trampling upon the legal rights of their customers.

The injunction sought, merely asks that they be *commanded to obey the law,* and furnish, at their tariff station, a place for the free delivery of livestock which they transport and from which they receive revenue. No interference with the custody of their property is asked, no obligation is sought to be imposed upon them except the *obligation of the law,* which thus far, they have wilfully and stubbornly disregarded.

Should the time come for the issuance of execution to enforce collection of a judgment from the corpus of the estate, of course a different situation will be faced.

Most Respectfully Submitted,

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Dated Chicago, Illinois, Jan. 11th, 1941.

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